No. 12861

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., AND CONTRACT GUARD'S AND PATROLMEN'S ORGANIZING COMMITTEE, I. L. W. U., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*),[1] for enforcement of its order issued on June 9, 1950, against Pinkerton's National Detective Agency, Inc., hereafter called the Company, and against Contract Guard's and Patrolmen's Organizing Committee, I. L. W. U., hereafter called the Union, following the usual proceedings under Section 10 of

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 30–33.

the Act. The Board's decision and order (R. 77) [2] are reported in 90 NLRB 205. This Court has jurisdiction of this proceeding under Section 10 (e) of the Act, the unfair labor practices having occured in San Francisco, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

Briefly, the Board found that the Company discriminated against several employees in violation of Section 8 (a) (3) of the Act by refusing employment to them because of their failure to maintain good standing in the Union, notwithstanding the absence of a

[2] References to the printed record are designated "R." Those references preceding a semicolon are to the Board's findings and those following a semicolon are to the supporting evidence.

[3] Both the Company and the Union stipulated, and the record shows, that the Company, a Delaware corporation with regional offices in San Francisco, California, is engaged in the business of furnishing protection service to individuals and business establishments, including operators of ships engaged in the transportation of passengers and cargo between ports on the Pacific Coast and other ports located in various States of the United States, its territories and possessions, and in foreign countries; and that during the year ending December 31, 1947, the Company received over $600,000 for services supplied in the West Coast region, 85 percent of which was received for its services to operators of passenger and cargo ships (R. 29; 4–6, 12, 101). Although the Company has not questioned the Board's jurisdiction, the Union has contended that there is no evidence in the record to show that the Company's and its own activities affected commerce.

In view of the admitted facts, however, the Board's finding (R. 29) that the unfair labor practices affected commerce is clearly correct. *Butler Bros.* v. *N. L. R. B.*, 134 F. 2d 981, 983 (C. A. 7), certiorari denied, 320 U. S. 789. Cf. *N. L. R. B.* v. *E. C. Atkins & Co.*, 331 U. S. 398; *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Walling* v. *Sondock*, 132 F. 2d 77, 78 (C. A. 5), certiorari denied 318 U. S. 772.

valid union-security agreement between the Company and the Union. The Board also found that the Union caused the Company to refuse employment to all but one of these employees for the stated reason and thereby violated Section 8 (b) (2) of the Act. In addition, the Board found that the Union further violated Section 8 (b) (1) (A) by engaging in various acts of restraint and coercion against the Company's employees in the exercise of their rights under Section 7 of the Act. We set forth below in detail the Board's subsidiary findings and conclusions.

A. The illegal union shop contract

On August 1, 1946, the International Longshoremen's and Warehousemen's Union, hereinafter called the International, acting on behalf of Local 34 and certain other of its locals, entered into a collective bargaining agreement with the Company (R. 30; 111). The agreement contained the following union-shop provisions (R. 112):

> Section I. Recognition:
>
> The Employer recognizes the Union as the sole collective bargaining agent * * * for all persons employed as guards and patrolmen * * *.
>
> Section II. Union Shop:
>
> It is understood in hiring to fill all vacancies of new positions, the Employer will, under this Agreement, choose his own source of new employees. The Employer agrees to notify the Union of such employment. New employees so hired under and subject to this Contract shall join the Union within fifteen (15) days of the date of their employment.

> The Employer agrees to terminate within forty-eight (48) hours the employment of any employee who becomes delinquent and in bad standing with the Union.

By its terms the contract was to "remain in full force and effect until June 15, 1947, and shall be renewed from year to year thereafter" unless either party gave timely notice prior to that date to terminate it. The contract was renewed for one year on June 15, 1947 pursuant to the automatic renewal clause contained therein (R. 31–32; 106, 112).

In December 1947, Local 34 sequestered its maritime guards and patrolmen members and placed them into an organization known as the Contract Guard's and Patrolmen's Organizing Committee, respondent Union herein (R. 32; 217).[4] Thereafter, the Union operated under the renewed agreement with the tacit approval of the Company (R. 32; 106). On June 15, 1948, after the effective date of the amended Act, the agreement, including the union-shop provisions, was again automatically renewed (R. 32; 107). The Union had not been authorized by the employees, as required by Sections 8 (a) (3) and 9 (e) of the amended Act to make a union-shop agreement (R. 48; 218–219).

The Board found that the union-shop provisions of the agreement as renewed on June 15, 1948, were repugnant to Section 8 (a) (3) of the Act because a majority of the Company's employees had not authorized the Union to execute a union-security agreement as provided in Section 9 (e) of the Act, and, further,

[4] The Union was chartered by the International in January 1949 (R. 32; 217–218).

because that provision required new employees to join the Union within fifteen days of the date of their employment instead of thirty days, as required by Section 8 (a) (3) of the Act (R. 48–49, 91).

B. The Union's coercive letter of July 7, 1948 and subsequent unlawful strike

Shortly after the second renewal of the contract, the Company was advised by its attorneys that the union-shop provisions thereof were not binding (R. 107–108). Accordingly, representatives of the Union and of the Company met to discuss the question of enforcement of these provisions. The Company took the position that the union-shop provisions were illegal. The Union, however, insisted that they were valid and therefore binding upon the Company (R. 32; 115–117, 134). Thereafter, on July 7, 1948, Michael Johnson, the Union's organizer and business agent (R. 33; 108), sent to all of the Company's guards a letter threatening reprisals against those who failed to remain in good standing with the Union. The letter stated, in part, that (R. 87–88; 172–173):

> 1. The coastwide agreement between the ILWU-CIO and the Pinkerton agency has been extended until June 15, 1949 by mutual agreement between the Company and the Union, and all of its terms and conditions are in effect and full force until that date. Anyone who tells you any different is just a plain liar and is only doing so to break down your union—the union that raised your wages *$4.00* a *day* in two years.

* * * * *

3. The membership voted unanimously that the fines for being delinquent in dues be enforced. Starting July 9 these fines will be in effect and delinquents will be dealt with according to the agreement.

* * * * *

Following its meeting with the Company, the Union gave the Company a list containing the names of a number of employees who were delinquent in their dues. Among those listed were Conners, Slater, and Holmes, and possibly Stenhouse, all of whom were employed by the Company as waterfront guards (R. 39; 206, 207). Apparently, the Company continued to give assignments to these employees and in the first week of August 1948, the Union called a brief strike to force the Company, as the Board found, to discharge those employees who were not members in good standing in the Union (R. 37–35, 88–89; 110, 139–140, 144).

On the basis of the foregoing facts the Board found (R. 88–89) that the Union in violation of Section 8 (b) (1) (A) of the Act restrained and coerced the Company's employees in the exercise of their right to refrain from becoming or remaining members in a labor organization, absent a valid union-security agreement, by (a) threatening employees with loss of employment for failure to pay union dues and maintain membership in the Union and (b) striking to compel the Company to discharge Conners, Slater, and Holmes because of their failure to pay union dues.

C. The discriminatory layoffs

On August 7, 1948, Business Agent Johnson and J. O. Camden, the Company's assistant general manager (R. 102), executed an agreement settling the strike (R. 37; 115). The agreement (R. 128) provided, among other things, that "Preference of employment shall be given to members of the Union who are available, willing, and able to work." At the hearing before the trial examiner, Camden testified (R. 50–51; 210–212) that at this meeting it was also "understood" and "agreed" between the Company's and the Union's representatives that the employment of Conners, Slater, and Holmes, who had discontinued paying union dues, be terminated. On the same day, the Company removed them from employment as waterfront guards (*ibid.*).

Two or three days later, Camden advised Johnson that the strike settlement agreement with its preferential hiring clause violated the Act, and that both the Company and the Union "would be in trouble and charged with unfair labor practices" if, pursuant to their understanding, they continued to refuse employment to Conners, Slater, and Holmes (R. 51–52; 212–213). Johnson had by this time apparently "cooled off" (R. 219) and directed Camden to send the three employees back to work (R. 52; 213). As will appear below (pp. 8–14), however, although assignments were offered to Conners, Slater, and Holmes shortly thereafter, the Union subsequently again caused the Company to refuse waterfront assignments to the three employees because they were delinquent in their dues. The Company also, al-

though not at the instigation of the Union, refused employment to Stenhouse for the same reason. The facts relating to the layoffs of these employees are as follows:

1. The layoff of Slater

a. On August 7, 1948

Walter J. Slater, who was employed by the Company as a waterfront guard (R. 44; 174), had stopped paying dues to the Union sometime after May 1948 (R. 44; 175). Between July 20 and 25, the Union's business agent, Johnson, telephoned Slater and told him, "Unless you get over here and pay some dues, you are not going to work" (*ibid.*).

On August 6, 1948, upon completion of his work for that day Slater telephoned O'Neal, a regular dispatcher for the Company (R. 39; 176), regarding his next assignment. Instead of giving him an assignment, O'Neal said, "Don't you know that we have got a strike on here on account of you fellows?" O'Neal then stated that he would communicate with Slater later (R. 44–45; 176–177). This promise was not fulfilled and on the following day, Slater telephoned O'Neal, who advised him, "Until this strike is settled, we cannot give you any information" (R. 45; 178). As already pointed out (*supra,* p. 7), pursuant to the agreement made when the strike was settled on August 7, the Company terminated the employment of Slater and other employees who were delinquent in their dues.[5]

[5] In the middle of August, the Company offered a waterfront assignment to Slater who thereupon asked Assistant Manager Camden whether it would be advisable to accept the assignment in

b. On September 16, 1948

On September 2, 1948, a number of unions on the west coast, including several affiliates of the International, began a general waterfront strike and established picket lines at the waterfront (R. 41, 81–82; 214–215). No employees were permitted to pass through the picket lines without clearance from the striking unions (R. 41, 81–82; 216–217). Although respondent Union did not participate in the strike (R. 217), the Company was notified that it would be necessary for all its employees to obtain permits to pass through the picket lines (R. 82; 205).

On September 16, 1948, the Company gave Slater a waterfront assignment conditioned, however, on his obtaining a clearance permit from Business Agent Johnson (R. 45; 180–181, 183–5). That afternoon Slater, accompanied by John T. Conners, another complainant herein (*infra,* p. 10), visited Johnson's office to obtain clearances. Johnson stated that he had not decided whether to clear them and left to make a phone call. When he did not return after

view of the then "existing conditions." Despite Business Agent Johnson's direction to put the delinquent members back to work (*supra*, p. 7). Camden seized this opportunity to advise Slater against accepting the assignment, saying, "No, Slater, I don't think it would be advisable. I thank you for calling me, and I will have you released from this assignment, and I will call you back later and talk to you." Camden, however, did not call Slater as he had promised (R. 45; 178–179). The Board found that Slater was not justified in refusing the assignment and, therefore, that he was not discriminated against between August 11 and September 16 when, as appears above, the Company and the Union again acted to deny him employment (R. 80–81).

thirty or forty minutes had elapsed, Slater and Conners left (R. 41–42; 45–46, 181–183).

The following day, when Slater telephoned the Company for an assignment, he described his experience at Johnson's office and received no assignment (R. 186). Thereafter, he received no further waterfront assignments from the Company (R. 46; 188).[6]

2. The layoff of Conners

a. On August 7, 1948

The layoff of John T. Conners, another of the Company's waterfront guards, followed substantially the same pattern as Slater's. Conners had stopped paying dues to the Union in May or June 1948 (R. 40 n. 8; 147). About 9:00 p. m. on August 7, the day on which the strike settlement agreement was entered into between the Company and the Union, Baxter, a substitute dispatcher for the Company, phoned Conners and instructed him not to report to his regular 11:00 p. m. assignment on the S. S. *Marine Lynx* (R. 39; 149). The following morning, August 8, Conners phoned Dispatcher O'Neal to ascertain the reason for Baxter's instructions. O'Neal stated (R. 39; 150):

> We got a list of names here that Mike Johnson brought up to us, and your name is on the

[6] On October 4, 1948, the Company offered Slater a job at a construction project at a higher hourly rate of pay than he had been receiving as a waterfront guard. Slater refused the assignment because he was working elsewhere (R. 83; 205–206). The Board accordingly found that by turning down the job, Slater indicated his intention to sever all remaining connections with the Company and refused to order his reinstatement or to award him any back pay after October 4 (R. 83).

list of nonpayment of dues. So, we can't do anything about it.

On August 9, Conners advised Assistant Manager Camden of the situation and was told to see Gerard, the Captain of the Guards. Gerard told Conners that he had not been dispatched because his name was on the delinquency list which Johnson had presented to the Company (R. 39–40; 150–153). Conners was never again assigned to the S. S. *Marine Lynx* (R. 154).[7]

b. On September 16, 1948

On September 16, 1948, during the general waterfront strike, Conners, like Slater, received an assignment conditioned on his obtaining clearance to pass through the picket lines (R. 40; 157). As already stated (*supra,* pp. 9–10), Conners and Slater requested clearances from Business Agent Johnson, who did not comply with their request. The following day, Conners spoke to Captain Gerard, Dispatcher O'Neal and substitute Dispatcher Baxter regarding a work assignment. During their discussion, a telephone call was received from Johnson. O'Neal asked Johnson whether it was necessary for Conners and Slater to pay their back dues in order to obtain clearances and was told that it was. O'Neal so informed Con-

[7] On August 10, 1948, Conners was offered a waterfront assignment for the following day. Like Slater, he asked Assistant Manager Camden whether to accept the assignment, was advised in the negative, and turned it down (R. 40, 80–81; 154–156). As in the case of Slater, the Board found that in view of Conners' refusal of the assignment, the Company did not discriminate against Conners between August 11 and September 16, 1948 (R. 80–81).

ners and Gerard stated that he would communicate with Conners later (R. 42–43; 160–161). Conners did not, however, receive any further waterfront assignments from the Company (R. 42–43; 164).[8]

3. The layoff of Holmes

For about six months prior to August 7, 1948, Walter L. Holmes had worked steadily for the Company as a guard on the S. S. *Marine Lynx* (R. 46; 190). Sometime after June 1, Holmes stopped paying dues to the Union (*ibid.*). On August 7, 1948, at about 5:00 p. m., he received his assignment for the succeeding three or four days to guard the S. S. *Marine Lynx*.[9] At seven o'clock that evening, however, his dispatcher telephoned Holmes and stated, "I am sorry, Holmes, but you can't go to work tomorrow, * * * Michael Johnson just handed us a list of men that can't go to work, and your name is on the list" (R. 46; 191).

On August 9, 1948, Holmes sent a letter to Johnson enclosing his dues book and a money order for $5.00 in payment of his July and August 1948 dues (R. 46–47; 191–193). On the same day, Holmes informed

[8] On October 7, the Company offered Conners a two-day assignment guarding an industrial building. Conners refused the assigment because it would have jeopardized a steady job which he had secured and to which he was to report on the second day of the two-day assignment, and because the rate of pay for the industrial assignment was 90 cents per hour as compared with $1.20 per hour for waterfront work (R. 43–44; 166–167, 170–171).

[9] Under the Pacific Coast Working and Dispatching Rules, which were incorporated in the Company's collective bargaining agreement with the Union (R. 84; 113–114), a guard dispatched to a ship when it first came into port was entitled to continue working on that ship until it was moved (R. 84; 105–106).

his dispatcher that he had paid the dues and asked for an assignment. The reply was, "No, we can't do that, not until we get an O. K. or something similar to that from Michael Johnson." A few days later the letter and money order were returned to Holmes (*ibid.*).

Thereafter, Holmes received a few waterfront assignments from the Company, but he was not fully restored to his prior status. Thus, during the week ending August 14, 1948, he obtained only sixteen hours of waterfront work as compared with the forty hours which he had worked the preceding week (R. 47; 193–194). On August 15, Holmes began a two-week vacation. During the second week the Company was shorthanded and requested Holmes to cut his vacation short. Accordingly, he worked eight hours on August 27 and seven hours on August 28 on waterfront assignments (R. 84; 194–195).[10] Thereafter, Holmes telephoned the Company on seven consecutive days, but received no further waterfront assignments from the Company although such assignments were available (R. 47; 196–197).[11]

[10] Although Holmes was entitled to continue working on the S. S. *Marine Lynx* (*supra*, p. 12, n. 9), he was assigned to the *President Polk* on August 11, to the *President Taft* on August 14, to the *Marine Lynx* on August 27, and to pier 40 on August 28 (R. 193–194).

[11] That waterfront assignments were available is, as the Board found (R. 84–86), indicated by several circumstances. Thus, as noted above, the Company called Holmes back to work twice during his vacation. During the general waterfront strike which began on September 2 and lasted until December 1948 the Company's detail of waterfront guards averaged 55½ daily in September, October, and November and 94 in December (Tr. 344–345).

About the middle of September, having concluded that the Company would not give him waterfront work, Holmes requested industrial assignments. Holmes, however, disliked such assignments, because of their uncertainty, their low wages, and the consequent need for working longer hours. Accordingly, on November 13, he advised the Company, "I'm afraid we'll have to call the whole thing off, if that's the best you can do." On November 15, Holmes turned in his equipment to the Company (R. 47; 197–198).

On December 17 or 18, 1948, Holmes received a telephone call from Dispatcher Jamison, who informed him that he could have his waterfront job with the Company if he could "square" himself with the Union. Holmes declined this conditional offer, stating that he had been "flimflammed too much to consider coming back" (R. 85; 200).

4. The layoff of Stenhouse

Thomas W. Stenhouse was also employed by the Company as a waterfront guard (R. 33; 135). Some time prior to February 1948, Stenhouse stopped paying dues to the Union (R. 33; Tr. 102, 105). On March 29, 1948, he was informed by Dispatcher Jamison that Business Agent Johnson had stated that Stenhouse could no longer work for the Company as a waterfront guard (R. 33; 135–136). On March 31,

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It is thus apparent that Holmes, who was No. 56 on the seniority register then being used by the Company in dispatching guards (R. 86; 117–126), was reached for assignment but not called. Moreover, during the strike the Company hired 12 new guards (R. 86; 118, 129, 132; Tr. 69).

1948, Johnson wrote to the Company demanding the immediate discharge of Stenhouse because he was delinquent in his dues to the Union (R. 33; 208). The union-shop agreement between the Company and the International then in effect was valid at that time by virtue of Section 102 of the Act and Stenhouse was discharged pursuant to Johnson's request (R. 33; 209).

On July 19, 1948, when the union-shop provision was no longer valid, the contract having been renewed on June 14, 1948, and being therefore no longer covered by Section 102, *infra,* p. 20, Stenhouse reapplied to the Company for a job as a waterfront guard. Although Assistant Manager Camden promised him a job, Stenhouse received no assignment (R. 34; 136–137). On July 21, he telephoned Camden, who apologized and promised him that he would nevertheless receive four days' pay for that week and five days' pay for the following week. Stenhouse received the promised four days' pay on July 23 but was not paid for the following week (R. 34–35; 138–139). On July 26, 1948, Stenhouse again asked Camden for an assignment. Camden, referring to the Union, stated to Stenhouse, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on" (R. 35; 139–140, 144). Stenhouse received no further assignments and the four days' pay was the last pay received by him from the Company (R. 35–36; 141). There is no evidence in the record that the Union ever knew of Camden's offer to reemploy

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Stenhouse in July or that it induced Camden specifically to refuse Stenhouse any work assignments (R. 79).

5. The Board's conclusions with respect to the layoffs

On the basis of the foregoing facts, the Board and the trial examiner found (R. 56, 80–83) that the Company discriminated against the the four guards discussed above in violation of Section 8 (a) (3) of the Act by (a) refusing waterfront assignments to Conners and Slater from August 7 to 10, 1948, inclusive, because they were delinquent in their dues to the Union; (b) conditioning Slater's employment from September 16 to October 4, 1948 inclusive and Conners' employment on and after September 16, 1948 on their obtaining clearances from the Union to pass through the picket lines;[12] and (c) denying waterfront employment to Stenhouse on and after July 23, 1948 and Holmes on and after August 7, 1948, because they were delinquent in their dues to the Union.

The Board also found that the Union had caused the Company discriminatorily to deny employment to Conners, Slater, and Holmes for the periods set forth above because of their failure to maintain membership in good standing in the Union and that the Union thereby violated Section 8 (b) (2) of the Act.[13]

[12] The Board, disagreeing with the trial examiner, found that Conners and Slater were not discriminated against from August 11 to September 16, 1948 (R. 80–81).

[13] The Board, disagreeing with the trial examiner, concluded (R. 79–80) that the record did not warrant a finding that the Union had specifically caused the Company to deny Stenhouse employment and accordingly found no violation on the part of the Union

The Board further found that the Union violated Section 8 (b) (1) (A) by the threat of its business agent, Johnson, to Slater that the latter would receive no more waterfront assignments if he failed to pay his dues.

II. The Board's order

The Board's order (R. 93–98) requires the Company and the Union to cease and desist from the unfair labor practices found. The order also requires the Company to offer Stenhouse, Conners, and Holmes reinstatement to their former or substantially equivalent positions, and to make Stenhouse whole for any loss of pay suffered by him by reason of its discrimination against him.[14] The order further requires the Company and the Union, both of whom were responsible for the discrimination against Conners, Slater, and Holmes, jointly and severally to make these employees whole for any loss of pay they may have suffered by reason of the discrimination against them during the periods specified in the order.[15]

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with respect to Stenhouse. The Board did find, however (R. 80), that the Company refused employment to Stenhouse after July 23, 1948, because of his failure to maintain good standing in the Union and, as noted above, found that the Company's action in this respect constituted unlawful discrimination.

[14] Since Slater indicated in October 1948 that he did not desire further employment with the Company, the order does not require his reinstatement.

[15] The Board adopted (R. 79) the examiner's recommendation that the complaint insofar as it named the International as a respondent be dismissed because the evidence failed to show that it had participated in the unfair labor practices committed by the Union. Since, however, no exceptions were taken by the Company

SUMMARY OF ARGUMENT

The record adequately supports the Board's findings that the Company denied waterfront employment to the four guards because of their failure to maintain good standing in the Union and that the Union caused the Company to deny such employment to three of the guards for that reason. Since the union-security agreement between the Company and the Union was invalid, and therefore affords no defense to such denial of employment, the Company and the Union by their action engaged in unfair labor practices prohibited by, respectively, Sections 8 (a) (3) and 8 (b) (2) of the Act.

The Union also violated Section 8 (b) (1) (A) of the Act by threatening economic reprisals against employees who failed to maintain good standing in the Union and by striking to force the dismissal of employees who failed to maintain such standing. In the absence of a valid union-security agreement, as here, a union may not exert economic pressure upon employees to forego their statutory right to refrain from becoming or remaining members of a union and

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or other party to the proceedings to the examiner's recommendation in this respect (R. 71–76), the Board did not pass on its correctness. The Company in its answer (R. 231) seeks review of the Board's dismissal of the complaint against the International. Under well established principles, the Company, having failed to take exception to the examiner's recommendation and to raise this objection before the Board, is precluded from urging it now. Section 10 (e) of the Act. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387–389, *N. L. R. B.* v. *Noroian* (C. A. 9, Nov. 28, 1951). This Court on November 14, 1951, denied the Company's motion to remand the case to the Board to take additional evidence allegedly establishing that it was the International, acting through the Union, that committed the unfair labor practices found.

such pressure constitutes restraint and coercion prohibited by Section 8 (b) (1) (A).

The Board properly ordered the Company, severally and jointly with the Union, to make three of the guards whole for any loss of pay caused by the discrimination against them and severally to make whole the fourth guard for such loss. The Company cannot disclaim responsibility for the discrimination against any of the guards because the Union caused it to engage in such discrimination. The Company's ultimate control over the employment of the guards and its failure to resist the Union's invasion of that control suffice to charge the Company, severally and jointly with the Union, with responsibility for the discriminatory denial of employment and for any loss of pay to the guards resulting from the discrimination against them.

ARGUMENT

I

The Board properly found that the Company violated Section 8 (a) (3) of the Act by refusing employment to the four waterfront guards because of their failure to maintain membership in good standing in the Union and that the Union violated Section 8 (b) (2) by causing the Company so to discriminate against three of the guards.

Section 8 (a) (3) of the Act makes it an unfair labor practice for an employer to refuse work to an employee because of nonmembership, or failure to maintain membership in good standing, in a labor organization, except pursuant to a union-shop agreement executed in conformity with the requirements of Section 8 (a) (3). Similarly, Section 8 (b) (2)

of the Act makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against employees in violation of Section 8 (a) (3), except as permitted by a valid union-security agreement between the union and the employer. Two of the statutory requirements for a valid union-security agreement, in effect when the unfair labor practices found here occurred, were (a) that any such agreement must afford to new employees at least thirty days from the commencement of their employment to join the union and (b) that a majority of the employees in the bargaining unit covered by the agreement have in a Board-conducted election, as provided in Section 9 (e) of the Act, authorized the union to enter into such an agreement.

The union-shop agreement on the basis of which employment was denied to the complainants in the instant case failed to meet either of these statutory requirements and therefore was invalid.[16] The agreement required new employees to join the Union within fifteen days following their employment and the

[16] It is not disputed that the agreement does not fall within the savings provisions of Section 102 of the Act. Unlike the agreement in *N. L. R. B.* v. *Clara-Val Packing Co.*, 191 F. 2d 556, which this Court held to be within the savings provisions of Section 102 because it was executed prior to the amended Act and was to continue without expiration date until terminated, the agreement here, although originally executed prior to the amended Act, was for one year and thereafter automatically renewable from year to year in the absence of notice to the contrary. The agreement was automatically renewed for a one year period on June 14, 1948, after the effective date of the amended Act. Since, therefore, it was thereby "renewed or extended" after that date, it does not come within the exemption of Section 102, as this Court pointed out in *Clara-Val.*

Union had never been authorized by the employees to enter into such an agreement.[17] *United Mine Workers* v. *N. L. R. B.*, 184 F. 2d 392 (C. A. D. C.), certiorari denied, 340 U. S. 934; *N. L. R. B.* v. *Peerless Quarries, Inc.*, 296 L. R. R. M. 2262 (C. A. 10, Dec. 31, 1951); *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d 686, 690–691, n. 8 (C. A. 2), certiorari denied, 338 U. S. 954; *N. L. R. B.* v. *Acme Mattress Co.*, 192 F. 2d 524 (C. A. 7), enforcing 91 NLRB 1010. Hence, the agreement, failing as it did to meet the statutory prerequisites, affords no defense to an otherwise discriminatory denial of employment. Accordingly, if, as the Board found, the Company denied employment to the four guards herein because of their failure to maintain good standing in the Union and the Union caused the Company so to discriminate against three of them, the Company and the Union have engaged in unfair labor practices proscribed by, respectively, Section 8 (a) (3) and 8 (b) (2) of the Act. *G. W. Hume Co.* v. *N. L. R. B.*, 180 F. 2d 445, 447 (C. A. 9); *N. L. R. B.* v. *Peerless Quarries, Inc., supra; N. L. R. B.* v. *Newman*, 187 F. 2d 488 (C. A. 2), enforcing *per curiam* 85 NLRB 725; *N. L. R. B.* v. *Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2); *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union*

[17] In 1951 Congress amended the Act and omitted the requirement that a union be authorized by the employees in a Board conducted referendum to enter into a union-security agreement. Act of October 22, 1951, Pub. L. 189, 82d Cong., 1st Sess. This amendment, without regard to any question of retroactive application (cf. *Eastern Coal Co.* v. *N. L. R. B.*, 176 F. 2d 131, 136–137 (C. A. 4)), does not affect the conclusion that the agreement here in question was defective. The Act continues to require that such agreements afford new employees thirty days following their employment within which to join the union.

192 F. 2d 654 (C. A. 2); see *N. L. R. B.* v. *Clara-Val Packing Co.*, 191 F. 2d 556 (C. A. 9).

The record in the instant case, summarized above, clearly establishes that Stenhouse, Holmes, Slater, and Conners were refused waterfront assignments by the Company during the stated periods solely because they had failed to pay dues and were not therefore in good standing with the Union. In the absence of a valid union-security agreement the Company's denial of employment to the four complainants for that reason was discriminatory within the proscription of Section 8 (a) (3) of the Act. See cases *supra*, p. 21. The Company does not now challenge this conclusion. In its answer to the Board's petition for enforcement of its order, the Company challenges only the propriety of the Board's order requiring it either severally or jointly with the Union to make any of the complainants whole for loss of pay caused by the discrimination against them (R. 230). We discuss this point *infra*, pp. 26–29.

The Union has filed no response to the Board's petition for enforcement of its order. Before the Board it urged principally that the record did not support any finding that the Union in violation of Section 8 (b) (2) had caused the Company to discriminate against three of the complainants (Holmes, Conners and Slater),[18] particularly after August 9 or

[18] As already noted, *supra*, p. 16, the Board found that the Union did not cause the Company to deny employment specifically to Stenhouse because of his failure to maintain good standing in the Union. The Board found that the Company, however, denied employment to Stenhouse for that reason. Accordingly, the Board concluded that only the Company was liable for back pay to Stenhouse.

10, 1948 when the Union's business agent, Johnson, told the Company that the three employees could be given waterfront assignments again and they were in fact given occasional assignments thereafter. The Board properly rejected this contention and found that beginning on August 7, 1948 and at various times thereafter the Union caused the Company to deny waterfront employment to the three guards because of their failure to maintain good standing in the Union.

As already stated (*supra*, pp. 6–8) the Union insisted that the Company discontinue giving waterfront assignments to guards, including the three guards here under discussion, who were delinquent in their union dues and during the first week of August 1948 called a strike to enforce that demand. On August 7, the Company and the Union executed a strike settlement agreement giving preference for employment to union members and pursuant to an understanding between it and the Union, the Company removed Conners, Slater, and Holmes from their employment as waterfront guards because of their failure to maintain good standing in the Union.

Although the Company, at the Union's direction, offered a few waterfront assignments to the three guards after August 9 or 10, 1948, the discrimination against them continued. Thus, on September 16, 1948, the Union refused to give clearance to Conners and Slater to cross the picket lines established during the general west coast strike because of their arrears in dues and the Company thereafter declined to dispatch them to waterfront assignments because of the

Union's failure to clear them, although such work was available (*supra,* pp. 9–12).

Holmes, after the Company terminated his employment on August 7, offered to pay his dues but the Union refused to accept them. Thereafter the Company removed Holmes from his regular assignment on the S. S. *Marine Lynx* to which he was entitled as a matter of right under the Pacific Coast Working and Dispatching Rules that had been incorporated in the Company's collective bargaining agreement. Holmes received no further waterfront assignments after August 28 and was told by the Company in December 1948 that he could have his waterfront job back only if he would "square" himself with the Union—a step which the Union had previously precluded him from taking (*supra,* pp. 12–14).

Significantly, neither the Union nor the Company ever advised these three guards that the August 7 layoffs would not be repeated and that no further discrimination would be practiced against them. Nor did the Company and the Union abrogate the illegal union security provision in their collective bargaining agreement or the clause in the strike settlement agreement giving preference to Union members for employment. And finally, none of the three guards was listed on the seniority register of November 30, 1948, on the basis of which the Company dispatched guards.[19]

[19] While it might be expected that Slater and Holmes would not be listed since the former had refused an assignment as late as October 4, 1948, and the latter had turned in his equipment on November 15, no reason has been suggested for the omission of Conners' name from the register.

In this state of the record the Board reasonably concluded that the Union had, in violation of Section 8 (b) (2) of the Act, caused the Company to discriminate against the three guards; that the Union's direction that they be put back to work was only a temporary relaxation of its pressure against the Company to force it to refuse employment to them and that the Union continued after August 9 or 10 to cause the Company to discriminate against them.

II

The Board properly found that the Union in violation of Section 8 (b) (1) (A) of the Act restrained and coerced the Company's employees in the exercise of rights guaranteed by the Act

The record discloses, without contradiction (*supra,* pp. 5–6), that on July 7, 1948, the Union's business agent, Johnson, sent to the Company's employees a letter informing them in substance that failure to pay dues and maintain good standing in the Union, as required by the agreement between the Union and the Company, would jeopardize their continued employment.[20] Later that month, Johnson warned Employee Slater that he would not be permitted to work unless he paid his dues (*supra,* p. 8). In August 1948 the Union called a strike to force the Company to discontinue the employment of guards not in good standing with the Union (*supra,* p. 6). The Board correctly found that by engaging in the foregoing

[20] The agreement (*supra*, pp. 3–4) required the Company to discharge within 48 hours any employee who failed to pay his dues.

activities the Union violated Section 8 (b) (1) (A) of the Act.

That section provides, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed under Section 7 * * *." Among the rights guaranteed to employees by Section 7 is the right to refrain from becoming or remaining a member of a union, except to the extent that such right may be affected by a valid union security agreement. Since, as we have shown, the union security agreement requiring membership in the Union as a condition of employment was invalid, the Union's threats of loss of employment against employees who refused, as was their right, to maintain their membership in good standing, and the use of its economic power to effectuate these threats plainly constitute restraint and coercion within the prohibition of Section 8 (b) (1) (A). *Mavis* v. *N. L. R. B.* 186 F. 2d 671 (C. A. 10), certiorari denied, 342 U. S. 813; *N. L. R. B.* v. *United Mine Workers,* 190 F. 2d 251 (C. A. 4), enforcing 92 NLRB 953; *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815.

III

The Board properly ordered the Company and the Union, jointly and severally, to make whole three of the guards for any loss of pay they may have suffered as a result of the discrimination against them

The Company challenges as invalid the Board's order insofar as it imposes liability upon it severally

or jointly with the Union for any loss of pay suffered by the guards as a result of the discrimination against them. The Company asserts that it was not "responsible" for the discrimination against the guards, that the real offender was the Union and that under Section 10 (c) of the Act [21] the Union alone is answerable for any loss of pay suffered by the guards.

The Company's disclaimer of responsibility is, as this and other courts have repeatedly held in similar situations, untenable. Although the discrimination against the guards might not have been effected but for the Union's demands, the fact remains that, in the ultimate analysis, it was the Company which controlled the employment of the guards. Because control over the hiring and discharge of employees rests with the employer, it is the duty of an employer to resist the usurpation of his control over employment by any group that seeks to utilize such control for or against any labor organization, and the Act affords no immunity because the employer believes the exigencies of the moment require that he capitulate to the pressures and violate the statute. *N. L. R. B.* v. *Fry Roofing Co.,* 29 LRRM 2221 (C. A. 9, November 30, 1951); *N. L. R. B.* v. *Star Publishing*

[21] Section 10 (c), in relevant part, empowers the Board to issue orders requiring persons who have engaged in unfair labor practices "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him; * * *."

Co., 97 F. 2d 465, 470 (C. A. 9); *N. L. R. B.* v. *G. W. Hume Co.,* 180 F. 2d 445, 447 (C. A. 9).[22]

Since the Company cannot, therefore, disclaim responsibility for the discrimination, Section 10 (c) does not relieve it of liability, severally or jointly with the Union, for loss of pay suffered by the guards as a result of the discrimination against them. As the Court of Appeals for the Seventh Circuit, holding that the Board could impose joint and several liability upon an employer for loss of pay suffered by employees discharged at the insistence of a union, has stated (*Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, at p. 1014, (certiorari denied, 342 U. S. 815)):

> Congress manifested no intent to restrict [in Section 10 (c)] the remedial powers of the Board to a compulsory choice between the parties responsible for the discrimination suffered by the discharged employees. On the contrary, we think the amended section correlates the remedial parts of the Act with those substantive provisions of the amendments, and must be construed to permit the Board to hold an employer and a union liable for back pay where it finds them both responsible for the loss suffered by the discharged employees.

Accord: *N. L. R. B.* v. *Newspaper and Mail Deliverers Union,* 192 F. 2d 654 (C. A. 2); *N. L. R. B.* v. *Fry*

[22] Accord: *N. L. R. B.* v. *Fred P. Weissman Co.,* 170 F. 2d 952, 954–955 (C. A. 6), certiorari denied 336 U. S. 972; *N. L. R. B.* v. *American Car & Foundry Co.,* 161 F. 2d 501, 502–503 (C. A. 7); *Wilson & Co., Inc.* v. *N. L. R. B.,* 123 F. 2d 411, 417 (C. A. 8); *N. L. R. B.* v. *National Broadcasting Co.,* 150 F. 2d 895, 900 (C. A. 2).

Roofing Co., supra, enforcing 89 NLRB 854; *N. L. R. B.* v. *Acme Mattress Co., Inc.,* 192 F. 2d 524 (C. A. 7) enforcing 91 NLRB 1010; *N. L. R. B.* v. *Peerless Quarries, Inc.,* 29 LRRM 2262 (C. A. 10, Dec. 31, 1951).[23]

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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[23] Cf. the rule commonly applied in the field of torts that when the acts of two or more persons result in a legal wrong all of the joint tortfeasors are jointly and severally responsible for the entire damages, without regard to which of them initiated the wrong, and even though one of them may have acted under duress. *Restatement of the Law—Torts*, Vol. IV, Sec. 879.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151, *et seq.*), are as follows:

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sec-

tion 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Representatives and Elections

SEC. 9. * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative

of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.

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